ARIZONA CORPORATION COMMISSION

November 17, 2003

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 12th Street, SW
Washington, D.C. 20554

RE: Comments of the Arizona Corporation Commission in the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers - Notice of Proposed Rulemaking; CC Docket Nos. 01-338, 96-98, and 98-147

Dear Secretary Dortch:

The Arizona Corporation Commission requests that the attached Comments be accepted as a late filing in Docket Nos. 01-338 and 96-98. These Comments were timely filed electronically in Docket 98-147 on November 10, 2003, and while all three dockets numbers were entered, due to a misunderstanding of how the FCC's electronic filing site accepts multiple docket numbers, the Docket No. 98-147 is the only one which registered the filing. Therefore, it is requested that these Comments be accepted for consideration in Dockets 01-388 and 96-98.

In the event there are any questions, I can be contacted at the address and phone number listed below.

Very truly yours,

Dawn A. Wilson

Dawn A. Wilson
Paralegal, Legal Division
(602) 542-3995

Encl.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE
ARIZONA CORPORATION COMMISSION
REGARDING THE FEDERAL COMMUNICATIONS COMMISSION'S RULES IMPLEMENTING SECTION 252(I) OF THE TELECOMMUNICATIONS ACT OF 1996 ("PICK-AND-CHOOSE RULES")

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I. INTRODUCTION

Pursuant to the Further Notice of Proposed Rulemaking (FNPRM) released August 21, 2003, in the above-captioned proceeding, the Arizona Corporation Commission ("ACC") respectfully submits the following reply comments. The ACC, pursuant to Art. 15, Section 3 of the Constitution of the State of Arizona, is vested with the obligation and responsibility to oversee and regulate all telecommunications carriers who operate within the State of Arizona.

In the FNPRM, the Federal Communications Commission ("FCC" or "Commission") invited comment on its rules implementing Section 252(i) of the Telecommunications Act of 1996 ("the Act"). [1] Section 252(i), commonly referred to as the pick-and-choose rule, permits and/or allows requesting carriers to opt into individual portions of interconnection agreements without accepting all the unrelated terms and conditions of such agreements. [2]

The FCC requested "comment on whether the Commission should eliminate the pick-and choose rule and substitute an alternative interpretation of section 252(i)." [3] The FNPRM proposed an approach that would eliminate the current pick-and-choose rule for Incumbent Local Exchange Carriers ("ILECs) wherever the ILEC has filed and received state approval of a Statement of Generally Available Terms and Conditions ("SGAT"). [4]

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1 *Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147),* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 at 713, 720-729, released August 21, 2003, (*Triennial Review Order).*

2 47 C.F.R. §§ 51.809 (a)-(c).

3 *Id. Triennial Review Order, para.720*

4 *Id. para. 725.*

The ACC believes that the current pick-and-choose rule has worked well, in the State of Arizona, in facilitating intrastate wireline local exchange competition and oppose the changes proposed by the FCC at this time. The ACC believes that the comments of the CLECs should be given significant weight, because of the disparity in bargaining power which still exists between incumbent and competitive carriers today. Many of the CLECs filing comments in this proceeding urge the FCC not to eliminate and/or modify the current pick-and-choose rule because it gives them additional bargaining leverage with the ILEC, and allows them to obtain the benefit of other agreements without a lengthy arbitration or negotiation process.

While Qwest filed a SGAT with the ACC several years ago and relied upon it for 271 purposes, the ACC does not have enough experience with the SGAT to know whether it offers a satisfactory replacement to the current pick-and-choose rule. Qwest's Arizona SGAT was significantly revised in the Arizona Section 271 workshop process and portions of it were approved by the Commission along with the corresponding checklist item as being Section 271 compliant. However, the ACC has not yet put a process in place to require updates to the SGAT.

II. DISCUSSION

A. Arizona's Experience

The Telecommunications Act of 1996 ("Act") established a regulatory framework whereby states are to review and approve interconnection

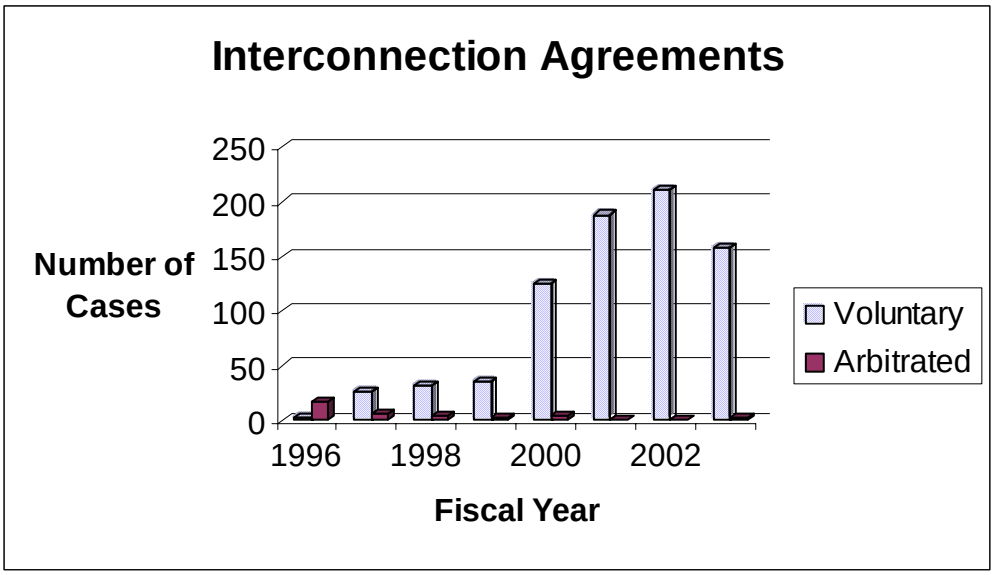
agreements entered into between the ILEC and CLEC under Section 252 of the Act. Under Section 252 of the Act, ILECs and CLECs may voluntarily negotiate the terms and conditions of an interconnection agreement, the CLEC may opt-in to another provider's interconnection agreement (or portions thereof) or the ILEC and CLEC may elect, where agreement cannot be reached, to have the State commission arbitrate or mediate the provisions of an interconnection agreement.

Since 1996 through October 28, 2003, the ACC has reviewed and approved a total of 813 interconnection agreements and amendments. Of the 813 interconnection agreements, 36 were arbitrated and 777 were voluntary interconnection agreements or amendments to existing agreements.[5] Below are a table and a graph that depict the number of interconnection agreement cases (by category and year) that were filed with the ACC since 1996.

Interconnection Agreement Cases

	1996	1997	1998	1999	2000	2001	2002	2003
Voluntary	2	26	32	35	125	188	211	158
Arbitrated	17	6	4	3	4	0	0	2

[5] In the voluntary interconnection agreement category the ACC has included both negotiated agreements and agreements adopted through 252(i) of the Act.



The table and the graph show that there has been significant increase in the number of voluntary interconnection agreements entered into by CLECs. According to the ACC's records, two (2) voluntary interconnection agreements were filed and approved in 1996 as compared to 211 in 2002. This indicates that since the initial round of arbitrations in Arizona, voluntary negotiation and/or opt-in pursuant to Section 252(i) of the Act has been successful and is the preferred method of contract formation between CLEC and ILEC.

Furthermore, the table and the graph show that the number of arbitrated interconnection agreements went from 17 in 1996 to zero in 2001 and 2002. Two (2) requests for arbitration of interconnection agreements were filed this year with the ACC. The decrease in the number of arbitrated or contested interconnection agreements illustrates that the existing process of entering into interconnection agreements is well understood by both the CLECs and the ILECs and it seems to be working well. Based on the number of interconnection

agreements filed with the ACC, the current pick-and choose regime seems to facilitate negotiations between ILEC and CLEC thereby acting to promote CLEC entry into the local exchange market in Arizona in an efficient and expeditious manner. In addition, "pick-and-choose" enables or affords the small size CLECs, who have limited financial resources, the opportunity to enjoy the same rates, terms, and conditions that the ILECs provide to large CLECs.

B. The SGAT Proposal

The Commission seeks comment on replacing the existing pick-and-choose regime with the SGAT regime. In the FNRPM, the Commission sought comment on the reasonableness of interpreting section 252(i) to allow carriers to opt into entire agreements, but not individual provisions, subject to satisfaction of the following SGAT conditions.[6] The FCC proposed that if an ILEC does not file and obtain state approval for a SGAT the current pick and choose rule would continue to apply to all of that ILEC's interconnection agreements.[7] Conversely, if an ILEC does file and obtain state approval for a SGAT, the current pick and choose rule would apply solely to the SGAT and all other interconnection agreements entered into by that ILEC would be subject to an "all-or-nothing" rule requiring third parties to adopt the interconnection agreement in its entirety.[8]

Currently, Qwest has an SGAT on file with the Commission in Arizona, which is available to all competitive carriers to opt-into. Portions of Qwest's SGAT were addressed with the relevant checklist items in the Section 271

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6 *Id. para. 725*
7 *Id.*
8 *Id.*

workshops that were conducted by the ACC in Docket No. T-00000A-97-0238. The checklist items along with the corresponding SGAT provisions were approved by the ACC as being Section 271 compliant in Decisions entered between March 2001 and August 2003.

If the FCC's SGAT proposal is implemented, It would mean that third parties would only be allowed to "pick-and-choose" from the SGAT and not from other approved interconnection agreements. If a third party wants to choose rates, terms and conditions from another interconnection agreement, the third party would be subject to the "all-or-nothing" rule, which means that the third party has to adopt the interconnection agreement in its entirety. The ACC agrees with CLECs that it would be premature to change the rule in this fashion at this time.

The ACC believes that the FCC's SGAT proposal will not provide adequate safeguards to prevent RBOC discrimination among CLECs. The FCC's SGAT proposal would allow RBOCs to provide certain benefits to a particular CLEC and bar other CLECs from receiving those benefits unless they accept the entire interconnection agreement. See also WorldCom Comments at pps. 12-13. ("Under the FCC's proposed rule, however, the incumbent LEC would be able to prevent other competitive LECs from obtaining the directory assistance terms because the competitive LECs would have to swallow the 'poison pills' in order to obtain the favorable terms.")

In addition, as WorldCom notes, SGATs may become outdated and less desirable to carriers unless a process is put in place to update them from time to

time. In addition, they contain terms and conditions that are necessarily very general in nature.

Only after the FCC is certain that all barriers to entry has been dismantled should it consider elimination or modification of the current pick-and-choose rule, and realignment of ILEC/CLEC bargaining rights in such a drastic fashion.

C. CLECs Believe that There is Still a Need For the Existing Rule and Offer Many Compelling Arguments to Retain it at This Time.

As evidenced by the Arizona experience and the CLEC comments in this proceeding, the CLECs put forth a variety of compelling arguments in favor of the current opt-in regime. See Comments of Covad Communications ("Covad believes that, absent any credible evidence of the innovative new commercial arrangements the Commission simply speculates will arise, it is premature for the Commission to adopt the drastic changes it proposes to its current 'pick-and-choose' rules."); Comments of Mpower Communications Corp.[9] ("…given the still nascent state of competition in the telecommunications market, the Commission's pick-and-choose rule is the only way CLECs, both struggling competitors and new entrants, can in any sense maintain some type of equal footing with ILECs with respect to bargaining power. If ILECs are not required to offer pick-and-choose to CLECs, ILECs will possess the power to force CLECs to arbitrate every issue of importance, thus substantially driving up the cost of, and delaying, entry and expansion."); WorldCom Inc. ("…in addition to being useful in

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[9] Mpower advocates that the FCC forbear from requiring state commission approval of interconnection agreements. The ACC believes that the authority preserved to states in Section 252(e) is not subject to forbearance under 47 USC Section 160. Nor is such a proposal in the public interest because state

preventing unlawful discrimination, the rule plays a key role in enabling competitive carriers to enter local markets quickly and efficiently."); Joint Comments of PACE and COMPTEL ("…in effect, the Commission would eliminate any scintilla of bargaining power that the CLECs might have in negotiating interconnection agreements with incumbent local exchange carriers ("ILECs"); Comments of ALTs ("The ILECs still wield monopoly control over essential, bottleneck facilities and insurmountable bargaining leverage over their wholesale clients who also happen to be their chief rivals for end-user retail customers. Until a competitive wholesale market emerges or can otherwise be replicated by proper regulator-designed incentive and penalty structures, or until CLECs otherwise gain equal bargaining leverage with their ILEC wholesalers/rivals, the CLECs need continuation of the rights granted by Congress and FCC rules implementing section 252(i) and Comments of the CLEC Coalition ("…"pick and choose must be retained in order to quell the overwhelming power of ILECs to force disadvantageous interconnection terms on their competitors, to protect smaller carriers against discrimination, and to reduce the barrier to entry associated with negotiating and arbitrating entire agreements.").

In addition, WorldCom pointed out that the current pick and choose rule allows carriers to craft customized agreements consistent with their business plans. In addition it avoids the re-litigation of previously decided issues. It helps in solidifying non-disputed terms so that parties are able to focus their efforts on

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commissions play an important role in ensuring that the contracts filed with them are not discriminatory or unlawful.

other areas that require further resolution. It also avoids the delays of prolonged negotiations and resource-intensive arbitrations, and enables competitive LECs to enter local markets more quickly. WorldCom Comments at p. 11.

The FCC should afford these Comments by the CLECs significant weight because they are the ones on the other side of the bargaining table with the ILEC. They know what works and what doesn't work to facilitate entry into the local market and to create a more level playing field.

III. CONCLUSION

For the reasons set forth above, the FCC should retain the current pick-and-choose rule because it works well in facilitating local exchange competition.

RESPECTFULLY SUBMITTED this 10th day of November, 2003.

/s/

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